

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE
United States Court of Appeals for the
District of Columbia

OCTOBER TERM, 1940.

No. 7762.

ABRAHAM GREENBLAT,
APPELLANT,

VS.

HARRY S. WENDER, LOUIS HARRIS ULANOW,
WOLF B. WENDER, ROSIE WENDER, Trustee,
GERTRUDE S. WENDER, Trustee,
APPELLEES.

BRIEF FOR APPELLEES HARRY S. WENDER
AND WOLF B. WENDER.

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**BRIEF FOR APPELLEES HARRY S. WENDER
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Nature of Appellant's Brief.

Appellant was plaintiff below and will be so called herein. All five appellees were defendants below and wherever referred to each will be separately called defendant. Harry S. Wender and Wolf B. Wender are the appellees herein, and where grouped will be called "appellees" or "the Wenders" a designation also used by plaintiff in his type-written brief.

The contract of February 17, 1938 (P. Ex. 4) between the Wenders as the first parties, and the defendant Louis Harris Ulanow and the plaintiff Abraham Greenblat as the second parties will be referred to as "the contract."

Plaintiff at the outset confuses the reader by his statement that "The Appellees shall be referred to as defendants" (B. 2). This indiscriminate and reckless use of the "defendants" and the pronouns "they," "them" and "their" literally permeates his brief. As a corollary, close scrutiny must be given to such phrases appearing therein as "It is conceded;" "The undisputed evidence also shows;" "is definitely shown by the evidence;" and "It is not disputed." Apropos hereof, the Substituted Statement of Evidence, the Findings of Fact and the Conclusions of Law painstakingly segregate or show proper group relationships of all parties. The point is that these and similar matters later shown constitute a departure by plaintiff from the evidence of record. Since he filed no objections thereto, he must be bound thereby under Rule 75 (c), (h) of Federal Rules of Civil Procedure. *Laughlin v. Berens*, No. 7603, decided by this Court December 23, 1940. In fact plaintiff, by his many references thereto, adopts that Statement.

Plaintiff, under the heading "The Case" (B. 1-5), repeats *in extenso* the allegations of his 8-page Bill of Complaint (R. 1). He frequently mixes strict matters of pleading with argumentative references to the Substituted Statement of Evidence (R. 75-108) that properly belong in his "Statement of Facts" (B. 5-7).

Further objections to plaintiff's brief as a whole are based upon his many departures from the record and constant repetition of argument and references to the same parts of the record.

It is therefore feared that appellees will be obliged to burden this Court with a much more extended brief than otherwise would be required. An attempt will be made, however, to reduce the issues involved to fundamentals treating them as concisely and clearly as possible. Unless extreme care is exercised in comparing the evidence as disclosed by the record with the interpolations by and reasoning of plaintiff, the true situation may not appear.

Short Statement of Case.

This is an appeal by plaintiff below, Abraham Greenblat, from a final decree (R. 67) entered in the District Court of the United States for the District of Columbia dismissing his Bill of Complaint for cancellation of contract dated February 17, 1938 (P. Ex. 4) and Deed of Trust (D. Ex. 5) upon the ground of fraud, for an accounting and other relief. Said decree renders judgment thereon for all defendants, including judgments for defendants Harry S. and Wolf B. Wender (appellees herein) on their separate counterclaims against plaintiff.

These counterclaims grew out of said contract and were based upon three promissory notes executed by plaintiff and defendant Ulanow jointly as makers in performance of the express conditions thereunder. Wolf B. Wender's counterclaim is for balance of \$2,950. on a \$3,000. note, while Harry S. Wender's claim is for balance of \$300. on a \$350. note, and for \$700. on a note payable to a bank and endorsed by him, all three notes bearing interest and attorney's fee (D. Exs. 4, 6, 8). In his separate Answers to these counterclaims, plaintiff denies liability upon these three promissory notes, and adopts as part of his Answers the averments of his Bill of Complaint with respect thereto.

The essence of plaintiff's complaint is that the Wenders and Ulanow, three of the five defendants, entered into a partnership agreement dated June 17, 1937 (P. Ex. 1) for the conduct of a junk and waste paper business in the District of Columbia; that the Wenders were silent partners therein; that said defendants had in their employ as bookkeeper one Marcus; that Marcus at the request of and "acting for and on behalf of the said defendants induced and urged plaintiff to purchase the interest of said Wenders in said business" by making certain representations to plaintiff with respect to the value and condition of said business, its inventory, indebtedness and encumbrances; that plaintiff was so urged on January 31, 1938 and relying upon said representations, agreed, by the execution of the February 17, 1938 contract, to purchase the said interest of the Wenders for \$4,000., including an existing indebtedness of the business to defendant Wolf B. Wender in the sum of \$3,000.; that \$1,000. of said purchase price was thereupon paid to the Wenders (P. Ex. 6) and a chattel deed of trust, wherein the defendants Gertrude S. and Rosie Wender were named as trustees, was executed by plaintiff and defendant Ulanow upon the partnership assets to secure the balance of \$3,000. (D. Ex. 5); that after entering into said business, plaintiff discovered the falsity of said representations and "made efforts to rescind said agreement with said defendants, but to no avail" and endeavored "to procure an adjustment." Wherefore, plaintiff prays: For receivership; for "rescission" of the February 17, 1938 contract; for "cancellation" of the chattel deed of trust and relief from obligation to pay the \$3,000. note which it secures; that the \$750. and \$350. notes be paid at the banks by the Wenders and Ulanow; for a full accounting among all the parties; and for "reimburse-

ment" for all moneys paid or advanced by him pursuant to said contract.

The separate answers of the Wenders and Ulanow all deny the fraud and deny the agency of Marcus, and all deny that Wolf B. Wender was at any time a partner, silent or otherwise, in L. Harris & Co. but all aver that the partnership of defendants Harry S. Wender and Ulanow, as evidenced by their promissory note, had borrowed \$3,000. from Wolf B. Wender and were indebted to him in said sum. Defendant Harry S. Wender avers affirmatively that he "had never taken an active part in the management or control of" said partnership business. Supplemental separate answer of defendant Harry S. Wender (R. 58) avers that unknown to him, the plaintiff and defendant Ulanow, prior to the execution of the February 17, 1938 contract, had entered into and operated for their own benefit an independent competing partnership with the then existing partnership of defendants Harry S. Wender and Ulanow.

The brief joint answer of defendants Gertrude S. and Rosie Wender, Trustees, avers they performed no duties of their office under the chattel deed of trust (D. Ex. 5) and can neither admit nor deny the material allegations of the complaint; and, except for inclusion in the statement appearing in Par. 1 of said decree, to wit, "and judgment for the defendants given," no further reference is made to them in the record.

The foregoing represents the material issues involved herein.

Argument.

Successively, appellant's brief groups his specifications of errors as follows: In his "Statement of Points" (B. 7-

S), in abridgment of the original 19 assignments contained in his statement of points filed below (R. 70), he sets forth 10 points "for discussion" as "objections to the findings of the Court below." Next under "Summary of Argument" (B. 8-9) he regroups his assignments into 6 points. Finally, under "Argument" (B. 9-21), he returns to the 10 assignments of error and regroups them into 8 parts for discussion, apparently abandoning the previous 6-point grouping. It thus appears somewhat difficult to follow appellant in the devious presentation of his contentions. However, appellees will direct their answers to the 10 assignments in said "Argument", and will at the same time endeavor to clarify the issues involved.

I.

Answer to 1st and 2nd Assignments of Error—

(1) In holding there was a meeting of the minds of the parties to the agreement of February 17, 1938.

(2) In holding there were no fraudulent representations made to plaintiff chargeable to defendants and that under the evidence the charge of fraud by the defendants was not sustained.

In plaintiff's 1st assignment of error he states affirmatively the negative action of the District Court in refusing to hold that there was *not* a meeting of the minds of the parties, which would have been necessary to justify a setting aside of the contract.

Examination of the contract (P. Ex. 4) shows that the Wenders jointly, upon performance by plaintiff and defendant Ulanow jointly of certain conditions, agreed to transfer to the latter all their right, title and interest in L. Harris & Co.

As consideration "for the signing" of the contract, plaintiff and Ulanow agreed to pay the Wenders \$4,000. whereof \$1,000. was to be paid upon signing (no reference being made as to payment from any particular fund) and the balance of \$3,000. in 24 monthly installments to be secured by chattel deed of trust (D. Ex. 5). Plaintiff and Ulanow further agreed jointly to execute forthwith, as makers, one promissory note for \$750. and another for \$350., both to replace outstanding notes of L. Harris & Co. in similar amounts at two banks; and plaintiff was to be substituted for Harry S. Wender on that company's checking account at one of the banks. Wolf B. Wender's name was not mentioned in connection with these two notes or bank account. The contract recognizes an outstanding \$3,000. "loan" to L. Harris & Co. by Wolf B. Wender.

It is not clear on what grounds plaintiff bases his contention that there was no meeting of the minds of the parties to the contract. He frequently refers to the "defendants" without proper group relationships.

These defendants challenge plaintiff's statements that they "frequently discussed the negotiations being carried on with the plaintiff," and that "the efforts of the defendants to complete this transaction is definitely shown by the record." (B. 10); also, "that the other parties to the contract knew the facts to be to the contrary," (B. 11). Singularly, he fails to refer to parts of the record where such statements may be borne out.

In contrast, Marcus testified that Ulanow told him in January to approach plaintiff (R. 77 (8-10)), and that Wolf B. Wender did not know of or authorize any transactions with plaintiff (R. 80 (42-43)).

Plaintiff himself testified that all his negotiations were with Marcus and not with Wender or Ulanow (R. 83 (14));

R. 101 (14-15)); but that he talked with Ulanow only a few days before signing the contract, (R. 101 (12-14)).

Ulanow testified that Harry S. Wender had no knowledge of any of his transactions with Greenblat, (R. 98 (19-21)); and that Ulanow personally spoke to plaintiff about coming into the business about February 4th (R. 98 (27-28)).

Harry S. Wender testified that when Marcus visited him on February 7th Marcus stated that he represented his uncle the plaintiff who had already come to an agreement with Ulanow with respect to L. Harris & Co. (R. 89 (21-22); R. 103 (26-30)); and that on no occasion did he authorize Ulanow to procure a purchaser for his interest (R. 104 (9)).

The draft of the contract was delivered by Harry S. Wender to Ulanow and Marcus (R. 107 (23-25)) and plaintiff had the final papers in his possession about a week before signing them on February 17th without change (R. 104 (18-20)).

Plaintiff testified that before signing the contract, he was aware that L. Harris & Co. owed money to the two banks, as therein indicated (R. 84 (10-12)). This and the further fact that he voluntarily signed a chattel trust to secure balance of \$3,000. negatives any concealment by the other parties to the contract, the Wenders. Besides, Ulanow became equally liable with plaintiff under that contract to the Wenders; and default judgment was rendered against Ulanow on the Wender counterclaims.

About a week after signing this contract plaintiff asked Harry S. Wender to draw up articles of partnership between plaintiff and Ulanow (R. 92 (24-25)); and about a month thereafter, he repeated the same request in the presence of Ulanow at the office of Harry S. Wender, (R. 97 (16-18)); (104 (20-23)). Therefore, when he signed the

contract with the Wenders, he knew he was dealing with them separately and that they had nothing to do with his own partnership arrangement with Ulanow.

Plaintiff states in his brief (B. 11) that "The Statement of the financial condition of the business prepared by Kline, accountant (D. Ex. 2) was testified to as not showing all of the partnership indebtedness, including the indebtedness to Cohen and Silverstein of \$1,800., Teitelbaum of \$175. and Harrison Brothers of \$250. (R. 82)". An examination of this reference to the record (R. 82) fails to show any mention of indebtedness to either Teitelbaum or Harrison Brothers. The entire record fails to indicate any reference whatsoever as to Teitelbaum, and as a matter of fact the Harrison Brothers \$250. indebtedness is set out in the Kline balance sheet (D. Ex. 2) under "Loans Payable". Plaintiff's statement that the Kline balance sheet fails to indicate these two items of indebtedness is thereby completely unsupported.

It is to be noted that the Kline balance sheet was prepared as of February 28, eleven days after the signing of the contract (P. Ex. 4) out of which this action arose, and 17 days after plaintiff signed a signature card at the Seat Pleasant Bank permitting him to make withdrawals from an account of the Louis Harris & Co. partnership without Harry S. Wender's knowledge (F. 11). It is not suggested by plaintiff that either of the Wenders was identified with the business at the time Kline prepared this balance sheet. As a matter of fact, it is undisputed that Kline was in the employ of the plaintiff and Ulanow exclusively, since Harry S. Wender had disposed of his interest in the business on February 17. Kline prepared the balance sheet from information given to him by Marcus (nephew and employee of plaintiff) who served as general manager of the business (R. 94 (8-10)). It cannot be inferred that appellees were

in any way responsible for any inaccuracy in this balance sheet since they had no knowledge of its preparation. Kline himself testified that "he did not know whether or not there was an indebtedness to Cohen & Silverstein at the time the balance sheet was prepared" (R. 94). It is conceded that Wolf B. Wender had nothing whatsoever to do with the business and that Harry S. Wender, being a silent partner, was not familiar with its affairs and hence was not in any position to furnish information as to the company's creditors. The testimony of Ulanow that "he did not himself know what the actual liabilities of the business were" (R. 99 (3)) is not rebutted by the plaintiff. Hence, the only person who knew the exact indebtedness of the business was Marcus, plaintiff's own nephew.

Neither is it contended by plaintiff that he at any time requested a balance sheet or accounting from Harry S. Wender, or from Ulanow for that matter, prior to the execution of the contract. If plaintiff had done so and Wender had furnished him with a statement that subsequently proved to be inaccurate, plaintiff might then have been in position to charge Wender with failure to apprise him of the business' true financial condition. Obviously, the balance sheet was not prepared on behalf or at the request of the Wenders and could not possibly be considered as an inducement by them to plaintiff to sign the contract.

Plaintiff's oft repeated claim that the inventory of the business was represented to him as being worth \$4,000. was never disproved. All witnesses agreed that at the time the contract was signed on Feb. 17, the company warehouses and yards were overloaded with merchandise (R. 82 (11-15); 93 (8-14)). This was the principal reason the business needed additional cash, its continued operation necessitating daily purchases of merchandise, but poor market conditions

prevented immediate resale at a profit (R. 82 (11-15); 93 (11-14); 98 (10-18)).

Plaintiff relies upon *Stone vs. Moody*, 41 Wash. 680, 84 P. 617, in support of his contention that there was no meeting of the minds of the parties (B. 11), merely reciting an extract therefrom without giving the facts.

An examination of this case reveals clearly the exceptional circumstances that must exist in order to set aside an executed contract for fraud. Stone sued to rescind a contract for the sale of certain farm lands, alleging fraud. Moody drew up the contract and *failed to read to Stone a disputed clause* therein authorizing Moody to sell any portion of the property direct to purchasers and to credit as cash any such sale upon his purchase price. In reversing a judgment of non-suit, the Court made the following observations at p. 686:

“* * * In cases of this character, to set aside a written instrument where the issue is as to whether the parties knew of certain things being in the contract, the question is usually one of veracity between the respective parties; and *where it is evident that the parties sought to be charged might have known, by the exercise of their natural faculties, of what the instrument contained, the law will not permit them to say that they did not know, but let the instrument speak for itself and be controlling.* But where such an *extraordinary* provision as we have here is found in a contract—one which, as a matter of law, renders the contract obnoxious to every sense of fairness, honesty and right, and is such as to make its enforcement clearly *unconscionable*—the Court is justified in believing that the party sought to be charged did not know of the presence of such provision, or did not have any comprehension of its significance.” (Italics supplied.)

In *Lyon vs. Smith*, 2 App. D. C. 37, also relied upon by plaintiff, this Court set aside a mortgage entered into by an illiterate, ignorant colored man, stating:

“We have no doubt that a *most unconscionable advantage* has been taken of the ignorance and the necessities of the complainant. The defendant Lyon himself admits that he made a hard bargain with him. It is a bargain which no court of equity will permit to stand, if it can find the means of avoiding it. The jealous scrutiny with which a court of equity will regard transactions between a mortgagor and a mortgagee could not have better opportunity for application in this case.” (Italics supplied.)

The Stone case turned on the “extraordinary provision” to be found in the contract, and in the Lyons case the plaintiff was a man of acknowledged ignorance and illiteracy. In both cases there existed the common element of the deliberate perpetration of fraud, and in addition the respective courts held the terms of the contracts to be clearly “unconscionable.”

Plaintiff has pointed out no “extraordinary” or “unconscionable” provision in the contract (P. Ex. 4). By his own admission he was a business man of 18 years’ standing (R. 84 (30)) and had had innumerable financial dealings with L. Harris & Co. involving large sums of money for a long period of time prior to the execution of the contract that he seeks to rescind (R. 85).

Answer to plaintiff’s contention that the Trial Court’s findings of fact are not binding on appeal when clearly wrong.

No fault can be found with plaintiff’s contention, “that while weight is to be given to the fact findings of the trial court, if upon an examination of the evidence it is found that the trial court’s findings are clearly erroneous, the decree based upon such findings will be reversed” (B. 13). This rule is so firmly established that plaintiff need not have cited a single case in its support. However, the con-

verse of this proposition has been repeatedly stated by this Court in announcing the rule that *findings of the trial Court, supported by substantial evidence, will not be disturbed and set aside on appeal*. Because this is so universally accepted, we direct attention to only a few recent cases, viz.:

Goodloe v. Hawk, No. 7437, decided June 24, 1940 (not yet reported), where this Court said:

"District Court findings * * * will not be disturbed unless manifestly erroneous," citing—

Cole v. Cole, 52 App. D. C. 302, 286 F. 764;

Diggs v. Diggs, 53 App. D. C. 56, 288 F. 266;

Blundon v. Blundon, 56 App. D. C. 313, 12 F. (2d) 848;

Frazier v. Frazier, 61 App. D. C. 279, 61 F. (2d) 920.

This Court stated in General Finance, Inc. v. Odessa, decided Jan. 29, 1940 (not yet reported), 68 W. L. R. 434, 435, viz.:

"There was other evidence for both parties. That which we have discussed was enough, in our judgment, to establish appellee's *prima facie* case. Its weight and the weight of appellant's countervailing evidence, were questions for the District Court."

In Richardson v. Richardson, decided March 18, 1940 (not yet reported), 68 W. L. R. 506, 507, this Court stated:

"Conflicting testimony was adduced on each issue and the Court found against the defendant on both. The character of the evidence adduced, as shown by the record, was such that the District Court's determination was entirely proper. Certainly it cannot be said that it was unwarranted or an abuse of the *broad measure of discretion accorded in equity actions where the evidence is conflicting*." (Italics supplied.)

Although plaintiff is profuse in citing cases setting out the power of appellate courts to reverse a District Court in its findings, no effort is made to demonstrate in what

respects the District Court had erred in the case at bar. The suggestion that "an examination of the evidence" shows that in his findings and conclusions the learned District Judge went "against the clear weight of the evidence" and that the record before this Court "shows that his findings are clearly wrong" (B. 14) is a remarkable example of arguing in circles.

The Substituted Statement of Evidence is comprised of 34 typewritten pages, setting out the testimony which served as the basis for the 20 separate and distinct findings of fact and 6 conclusions of law. These are clearly and painstakingly presented and constitute a comprehensive analysis of all the issues which arose at the trial. It would seem that it is incumbent upon plaintiff to indicate wherein these findings of fact or conclusions, or any of them, are not wholly justified, *let alone clearly wrong*, by the evidence adduced at the trial.

These appellees submit that the findings and conclusions of the District Court are amply supported by substantial and conclusive evidence.

II.

Answer to 3rd Assignment of Error—

(3) In holding that the agency of Marcus for defendants Harry S. Wender, Louis Harris Ulanow and Wolf B. Wender, or any of them, was not established.

This is referable to Findings of Fact Nos. 9 and 15 (R. 60), and is closely related to the discussion under the 2nd Assignment, *supra*.

None of the conclusions contained in plaintiff's 3rd assignment of error (B. 14, 15), which are based upon the

record of this case, serve to show that Marcus was authorized to act as an agent for these defendants. The broad statement that "The defendants knew plaintiff was being misled and by their silence ratified Marcus' misrepresentations" (B. 15) is wholly unfounded in fact. It is not supported by the record, which conclusively shows that these defendants had no knowledge whatsoever of any misrepresentations, if actually made, and the Court itself failed to find that there were any misrepresentations by Marcus to plaintiff (R. 60).

The case of *Hill v. Marston*, 65 App. D. C. 250, 82 F. (2d) 856, relied upon by plaintiff, is not in point. It relates to a situation where a 70-year old woman was *induced to sign a contract without reading it* through the fraudulent misrepresentations of the defendant as to its contents. This is distinguished from the case at bar, where the plaintiff himself dictated the terms of the contract and held it and its accompanying papers in his possession, unchanged, for over a week before signing.

It must be conceded that unless plaintiff can demonstrate by a preponderance of the evidence that his nephew Marcus was serving as agent for the Wenders, or as sub-agent for the Wenders through the agency of Ulanow, no fraudulent misrepresentations that may have been made by Marcus to plaintiff can be charged to the Wenders.

No showing has been made by plaintiff of the existence of such agency or sub-agency.

The only testimony on this point was by Ulanow to the effect that he had spoken to Harry S. Wender about the possibility of disposing of his interest in the partnership (R. 99 (30); 100 (1)). This is effectively rebutted by the denial of Harry S. Wender (R. 104 (9)). The testimony by Harry S. Wender that Marcus visited him at his office on February 7th stating he was representing his uncle the

plaintiff, stands undenied by plaintiff or Marcus. The fact is admitted that plaintiff had no personal contact whatsoever with the Wenders until the contract was signed (R. 83 (14); 88 (5); 92 (16, 17); B. 3, 5, 15).

Therefore, the only possible manner in which the Court can conclude that Marcus was the sub-agent of the Wenders would be upon the theory that Ulanow, as the partner of Harry S. Wender, could legally bind him by virtue of such relationship alone. This theory, however, is fallacious because acts of one partner can legally bind another partner only if they are for the purpose of carrying on the usual partnership business, or as otherwise stated, are *within the scope of the partnership business*. Hence it is the general rule that under his authority to do whatever is necessary to carry on the firm's business in the ordinary manner, *a partner has authority to appoint other persons as agents for the purpose of assisting in carrying on the partnership business*. (Tillier v. Whitehead, 1 Dall. 269; 1 L. Ed. 131); but not where the appointment is for a purpose *without the scope of the partnership business*. (*In re: Farmers etc. Bank*, 194 Mich. 200, 160 N. W. 601.)

As occurred in the instant case, it can hardly be successfully contended that the withdrawal of one partner and his replacement by an incoming partner to effect a new relationship with the remaining partner, can be considered as being within the scope of the partnership business.

The scope of the partnership business is determined by the partnership agreement or the conduct of the partners and their course of dealing (Smith v. Smith, 179 Iowa 1365; Kyle v. Griffin, 76 W. Va. 214, 85 S. E. 559).

The partnership agreement between defendants Ulanow and Harry S. Wender (P. Ex. 1) provides for no such agency by either partner, nor does the evidence indicate delegation of such authority by Harry S. Wender. The

chain of agency must necessarily include the admitted fact that Harry S. Wender was at all times acting for himself and as the authorized agent for his father, defendant, Wolf B. Wender. This is inconsistent with the agency theory proposed by plaintiff. The far more logical theory is that Marcus was actually the bona fide and authorized agent of his uncle, the plaintiff, whom he avowedly represented from the beginning of his contact with Harry S. Wender on February 7th. Marcus had even talked to plaintiff about the possibility of great profits in L. Harris & Co. as early as July, 1937, R. 79 (5-6).

The alignment of the parties to the contract—plaintiff and Ulanow (with a common interest) as against the Wenders—even more strongly repels plaintiff's agency theory, since this would cast Ulanow in the dual and inconsistent role of being an agent for, and an adverse party to Harry S. Wender.

Appellees cite a New York Court of Appeals case, namely, *Chamberlin v. Pryor*, 1 Abbott's Decisions 338, 2 Keys 538, where the facts are in many respects similar to those here.

This was an action for damages arising out of fraudulent representations whereby Plaintiff was induced to buy Prior's interest and become a member of an insolvent drug business comprised of three partners. The financial statement given to plaintiff at time of purchase was *wholly false*. Although it was set out in the Bill of Sale, a reference was made therein to the firm's books for a fuller description. Plaintiff paid \$2,200. for his purchase in the firm which failed within three months.

When plaintiff applied to Prior to purchase his interest Prior was unacquainted with the details of the business, but referred plaintiff for information to the bookkeeper, *who refused to allow plaintiff to examine the books* but furnish-

ed the statement of assets and liabilities contained in the Bill of Sale. Plaintiff found the stock on hand to be as represented in the statement, but the firm liabilities were materially in excess of the stated amount.

The opinion upholding the findings of the trial court on behalf of the defendant, proceeded:

“ * * * the report states that Prior was a farmer living on his farm; that he took no active part in carrying on the business and was unacquainted with its condition; that he himself believed in the truth of the statements made by his co-partners to Prior, upon the basis of which the trade was consummated. There is no ground, either upon the evidence or the referee's finding to charge Prior with the knowledge of the firm's pecuniary condition; nor is there any finding of fact that Prior assumed to know its condition, or that the Plaintiff relied upon any statements made by Prior in relation to its condition before the purchase.”

We do not believe the Plaintiff can produce any decision that goes so far as to hold that a silent partner retiring from the business should be held liable for the fraud or misrepresentation made to a succeeding partner by the remaining partner (or his agent) entirely without the knowledge of the retiring partner. Yet, this is what must be held in the instant case to sustain the plaintiff's theory. We submit that *Chamberlin v. Prior* expresses the correct principle of law, namely, that a silent partner without knowledge of fraudulent representation (as Harry S. Wender is conceded to be) cannot be bound thereby.

It is incumbent upon plaintiff to prove that Marcus was authorized to make representations to him on behalf of this defendant. In *Metropolitan Casualty & Insurance Co. vs. Potomac Builders Supply Co.*, 61 App. D. C. 255, this Court adopted the general rule cited in 2 C. J. 563, sec. 204 (b), “Duty of Third Person to Ascertain Authority.” The rule states:

“Source of Information: The person dealing with the agent should ascertain the extent of his authority from the principal, or from some other person who will have a motive to tell the truth in the interests of the principal, and he cannot rely upon the agent’s statement or assumption of authority, or upon the mere presumption of authority.”

The further quotation from the *Corpus Juris* citation, although not included in the Metropolitan case, *supra*, is applicable here. The same section concludes:

“Failure to Inquire: If such person makes no inquiry but chooses to rely on the agent’s statements he is chargeable with knowledge of the agent’s authority, and his ignorance of its extent will be no excuse to him, and the fault cannot be thrown upon the principal who never authorized the act or contract, although he was careless in reposing confidence in his agent.”

It is undenied that plaintiff, being the uncle of Marcus, was very close to him and was well aware of his personal financial condition. Marcus testified that his sole reason for making misrepresentations to his uncle as to the business was due to the fact that he wished to maintain his job (R. 80, (37-39)).

No inquiry on the part of plaintiff, as required under the foregoing rule, has been proven or alleged as against any of the defendants. Certainly, no investigation was made by plaintiff as to Marcus’ authority to speak for either of the Wenders as to the condition of the business, the truth being that no such authority of any kind had ever been given (R. 77 (8-10); 80 (42-43); 103 (26-30)). Under the circumstances, it is difficult to see how the District Court could possibly have erred in its findings Nos. 9 and 15.

III.

Answer to 4th Assignment of Error—

(4) In holding that defendants Harry S. Wender and Wolf B. Wender did not ratify the acts of Marcus respecting the sale of the partnership interest.

Defendants are unable to find anything in the findings of fact or conclusions of law (or in the Bill of Complaint) having to do with ratification by the Wenders of Marcus' acts, and it is therefore difficult to answer intelligently this alleged assignment of error.

Plaintiff argues that because the Wenders entered into the contract, it must be concluded that all that was said or done by either Marcus or Ulanow constitutes a ratification by the Wenders thereof (B. 16). He theorizes that it would be inequitable to permit the Wenders to retain the benefits of the acts of Marcus and Ulanow and yet not to be held responsible for the latters' conduct.

The recitals of the contract itself (P. Ex. 4) are the best evidence of the part the Wenders played in the entire picture. L. Harris & Co. owed Wolf B. Wender \$3,000. on a promissory note for a loan which was payable in any event, even if he had not entered into the contract. The same is true of the \$1,529. owed Harry S. Wender consisting of \$1,200. in cash advances and \$329. accumulated unpaid weekly installments as a partner (R. 96 (22-28)).

The total consideration to both Wenders was \$4,000., a reduction of \$529. from the amount due to both of them. Hence it is seen that the Wenders dealt on their own with plaintiff and received no benefit from the acts of either Marcus or Ulanow.

Plaintiff cites *Bloomquist v. Farson, et al.*, 222 N. Y. 375, 118 N. E. 855, 856 (B. 16) in support of his contention that

these appellees ratified acts of Marcus and Ulanow in making misrepresentations to him. The facts there are wholly dissimilar to those here. That was an action to rescind an exchange of traction bonds for irrigation bonds and for return of the former, alleging false representations in a printed prospectus and by defendant's agent regarding the bonds.

IV.

Answer to 5th Assignment of Error—

(5) In rendering judgment against the plaintiff and in favor of defendants Harry S. Wender and Wolf B. Wender upon their respective counterclaims.

Plaintiff's opening remarks under this heading (B. 16) can not be reconciled with any part of the record, since Plaintiff's Exhibit 1 is the original partnership agreement between Ulanow and Harry S. Wender, is dated June 17, 1937, and has no relationship to plaintiff.

The counterclaims of the Wenders were allowed by the trial court as a concomitant in upholding the contract, out of which they arose. Plaintiff's repeated statement that the substituted notes at the banks were signed by plaintiff as an accommodation (B. 17) is unfounded. Rather Harry S. Wender was accommodation endorser (Contract, par. 2 (d), (f)). The contract required plaintiff to execute those bank notes jointly with Ulanow *as maker*, and he did so. Only Harry S. Wender (and not Wolf B. Wender) was concerned with these notes, upon which his separate counterclaim is based.

The plain fact is that plaintiff signed these notes in "performance" of one of the express "conditions" of the

contract, for the same reason that he executed the chattel trust and the \$3,000. note it secured.

How can plaintiff explain his position when it is considered that after signing the \$350. National Bank of Washington note on Feb. 17, 1938, the Greenblat-Ulanow partnership made a curtailment of \$50. plus interest on March 18, 1938, leaving a balance of \$300. (D. Ex. 6)? Likewise, after signing the \$750. note on Feb. 17, 1938, \$50. and interest thereon were paid on March 21, 1938, and plaintiff joined in the execution of a new \$700. curtailment note at the same time. On March 17, 1938, the Greenblat-Ulanow partnership paid \$50. and interest on the \$3,000. note (D. Ex. 4). In every case plaintiff was not merely an endorser, but was actually a *maker* of said notes in accordance with the explicit terms of the contract. It represented a legitimate part of the consideration for the contract which he was perfectly satisfied to give at the time he executed the notes and made subsequent payments thereon. Plaintiff now assigns as error the award of judgment on these same obligations which he himself had recognized to be valid long after their execution.

The case of *Grossman v. Lewis, et al.*, 226 Mass. 163 is cited by plaintiff. The facts there had to do with the setting aside of a *partnership agreement* as such because of fraudulent misrepresentations by one partner to the other. It is fully recognized by appellees that a court of equity has ample jurisdiction to set aside partnership agreements for fraud, but we are unable to see how this well settled principle is applicable here.

V.

Answer to 6th Assignment of Error—

(6) In failing to credit the sum of \$1,000. on the Wolf B. Wender note in addition to the credit of \$50. allowed thereon.

Plaintiff's opening remarks under this heading (B. 18) are again unsupported by the record, since the testimony at the trial and the Seat Pleasant Bank book itself (D. Ex. 9) conclusively demonstrated that this account received many deposits in the conduct of the partnership business from Feb. 4, 1938 (the date the first deposit was made) and Feb. 18, the date of the \$1,000. check (P. Ex. 6). Plaintiff's constant references to the "\$4,000. deposited in the Seat Pleasant Bank" is wholly disproved, all the evidence showing that \$1260. of this amount represented the balance due on \$1560. for which Ulanow had received only \$1,000. (without the knowledge of Harry S. Wender). This loan to Ulanow was negotiated on Nov. 19, 1937 and secured by chattel deed of trust (D. Ex. 1) on the assets of the business. Ulanow testified that the note he gave for this loan was the one mentioned in the sum of \$1260. in the paper writing (P. Ex. 2) indicating receipt by him of \$4,000. from plaintiff on Feb. 11, 1938 (R. 98 (7-10)). As a matter of fact, only \$1500. was deposited by plaintiff in this account on Feb. 11, any other sums advanced to Ulanow by him having been presumably deposited prior to that time (R. 100 (13-15)).

As to the other advances, Ulanow testified that he had paid large bonuses to plaintiff for loans, including a \$50. bonus on a \$500. loan (R. 98 (9)).

The foregoing is offered to demonstrate the consistent reiteration of misstatements by plaintiff in an effort to

show a much larger payment than was actually made, and to completely camouflage his own unscrupulous and usurious transactions with Ulanow, wholly unknown to these appellees.

The contract obligated plaintiff (and Ulanow) to pay the Wenders \$4,000. of which \$1,000. was paid upon execution of the contract. The balance of \$3,000. (less \$50.) is claimed by Wolf B. Wender, there being no duplication since Harry S. Wender's counterclaim is limited to the two bank promissory notes whereon he was accommodation endorser.

In the preceding assignment, plaintiff specifies as error the judgments on these counterclaims, yet he here seems quite willing that the \$2,950. judgment for Wolf B. Wender stand if reduced by \$1,000. to which he is not entitled. Plaintiff is blowing hot and cold at the same time!

The suggestion that the \$1,000. check received by the Wenders was endorsed over to Wolf B. Wender by Harry S. Wender, and that therefore Wolf B. Wender is not entitled to recovery from the maker for the full amount of the note, is naive. The contract price was \$4,000, of which \$1,000. was paid by said check. Wolf B. Wender, as the bonafide holder of the note, obtained judgment on his counterclaim for \$2950. balance thereon. Hence, the basis for plaintiff's contention that a credit for the original \$1,000. should be applied to the balance on the note is utterly incomprehensible and without the slightest foundation in fact or in law.

VI

Answer to 7th Assignment of Error—

(7) In holding Wolf B. Wender was a creditor and not a member of said firm.

This results from Conclusion of Law No. 1 (R. 64).

Plaintiff seeks to remove from Wolf B. Wender his relationship as creditor because, forsooth, the contract recites a quitclaim of any interest he may have had in L. Harris & Co. There is no other apparent ground for this contention.

Plaintiff then states categorically that "The testimony shows (R. 95) that Wolf B. Wender received \$30. a week from the *profits* of the business for several months." If plaintiff were not so reckless in his positive statements, he would find that his own reference to the record shows only that Wolf B. Wender "*was paid* the sum of \$30. per week intermittently not more than six times." R. 95 (24) (Ulanow's testimony). Other witnesses testified on this point thus: Marcus—"had no business dealings with Wolf B. Wender except to *pay* him \$30. upon each of the several occasions, etc." (R. 81 (1); Harry S. Wender—his "*father had received* \$30. per week for several weeks, etc." (R. 88 (25)). Plaintiff has strained every nerve to force this contention. Even earlier in his brief he improperly injects this "profits" specter (B. 2, 9).

Even if the several payments to Wolf B. Wender were to have been from profits (which is of course negatived by the record), he still would be a creditor and not a partner, as is aptly enunciated by this Court in *Wilkinson v. Lincoln*, 46 App. D. C. 193, 197, where the single question was the existence of a partnership:

"* * * if * * * participation in profits was not a sharing in profits as a principal—in profits as profits as a joint

business—but under an agreement by which a sum was to be received which should be equal to a definite proportion of the profits as a compensation for services or rent, or *money advanced as a loan*, there will be no liability as a partner. Such an arrangement would contradict the notion of a partnership * * * Upon the contrary, the relation of debtor would be made out * * *” (Italics supplied.)

The complaint, plaintiff’s brief and all witnesses (except Kline who did not testify on this point), amply support Wolf B. Wender’s relationship to the business as a creditor.

It should be noted that even if Wolf B. Wender had been found to be a partner with his son Harry S. Wender and Ulanow, which seems hardly possible in view of the record, nevertheless this would in no way affect his rights with respect to the contract of Feb. 17. The very worst possible position in which he could be placed would be that of a silent partner, and every element of proof would have to be made against him as is required against Harry S. Wender. Since no fraud of any character against Harry S. Wender has been sustained, the relative status of Wolf B. Wender as that of creditor or partner becomes of little importance. Hence, any possible error by the trial Court as to this conclusion of law would not furnish ground in itself for reversal.

VII.

Answer to plaintiff's 8th Assignment of Error—

(8) In holding that plaintiff was thoroughly familiar with the affairs of the partnership business and its financial condition prior to Feb. 17, 1938, and in failing to give any credit whatsoever to plaintiff for the moneys advanced which admittedly went into the partnership business.

This is referable to Finding of Fact No. 16 (R. 60).

Plaintiff argues somewhat away from this point by advertng to a wholly irrelevant matter, namely, the Court's finding that the \$1,000. loan by plaintiff to the partnership in November when he exacted a \$560. bonus therefor was without the knowledge of Harry S. Wender (F. 3), previously referred to under V, 6th Assignment of Error. The complaint does not pray for return of this loan. Indeed, although the contract (par. 2 (c)) recites that he "forthwith" release the chattel trust securing said loan, it was revived and claimed as \$1,260. in the purported receipt from Ulanow to plaintiff listing items totaling \$4,000. (P. Ex. 2).

Adhering to the point, however, there is revealed the basis for the finding (F. 16) that plaintiff was thoroughly familiar with the affairs and financial condition of the partnership business before February 17th. In the first place, the very fact that any going business should have to pay a non-banker (plaintiff) 56% (\$560. on \$1,000.) for a loan is sufficient to put any reasonable man on notice that the borrower is *in extremis* financially. This was on November 19, 1937 some three months before February 17, 1938, the date he signed the contract. Prior to and during the same interval, plaintiff cashed the 93 L. Harris & Co. checks (D. Ex. 3). Included was an L. Harris & Co. check

(#1450 for \$325. dated February 2, 1938) which he was required to endorse before the payee, Leon Cherner, would accept it as a down payment on an automobile purchased by his nephew Marcus, which transaction plaintiff finally recalled on cross-examination (R. 79; 80; 85; 101 (22-30); 102 (1-4)). Just a few days later plaintiff signed the contract!

Although both plaintiff and Marcus denied that any bonus was received by plaintiff for cashing and endorsing these checks, and that it was all done merely as a matter of convenience, Ulanow testified that he was told by Marcus that plaintiff was charging \$25. for cashing large checks and smaller charges for smaller checks (R. 97 (21-23)). Also, plaintiff admitted that L. Harris & Co. check #1417 for \$350. dated January 29, 1938, payable to his order which he cashed, was twice deposited by him for collection because it "had been returned for lack of funds" (R. 102).

Marcus testified (R. 79 (10-13)) that plaintiff, his uncle, "frequently visited him at the L. Harris & Co. plant on South Capitol Street on his way to or from market." This was supported by testimony of Ulanow, who stated that plaintiff had been in the custom of visiting the L. Harris & Co. plant beginning in August of 1937 (R. 97 (25-26)). Plaintiff testified that he discussed the possibility of going into the partnership with Ulanow in the early part of 1938, but that he did not put up any money right away and waited until he had made up his mind that he was going into the business (R. 83 (23-25)).

VIII

Answer to 9th and 10th Assignments of Error—

(9) In failing to render a judgment in favor of plaintiff and against defendants for the sum claimed by him.

(10) In dismissing plaintiff's Bill of Complaint.

In these two assignments, plaintiff attempts to reiterate some of the ill founded contentions contained in previous assignments of error, duplicating the fallacious reasoning and misstatement of facts. The bold assertion (although not novel, it appearing earlier on the same page in connection with the 8th assignment) found on page 20 of plaintiff's brief that "plaintiff cancelled a deed of trust on the partnership business and that the money deposited by him in the Seat Pleasant Bank was applied to the payment of the previously existing partnership debts" without allowance therefor to the plaintiff, hardly agrees with the proof. At no place in the record is there anything to indicate that the plaintiff did in fact cancel or release his deed of trust (D. Ex. 1), although there is a recital in the Feb. 17 contract (par. 2 (b)) that he should "forthwith" release the same.

Here again plaintiff quotes mere extracts from a decided case without giving the facts but simply stating an abstract principle namely, that equity has jurisdiction to rescind a partnership contract induced by fraud. That case is *Oteri v. Scalzo*, 143 U. S. 578, 36 L. Ed. 824. Plaintiff has strewn his brief with a repetition of this type of case, reciting identical principles of law that are without dispute, yet wholly inapplicable on the facts to the case at bar.

On the whole case, the trial court found against the plaintiffs and for the defendants on all the issues. In that situation, there could be no division of the issues whereby a

money award could be made to plaintiff. However, there are other important grounds that militate against a finding for plaintiff. These will now be considered.

Equitable Estoppel.

(A) Plaintiff Is Not In Equity With Clean Hands.

By his long course of dealing with L. Harris & Co. *before* signing the contract on Feb. 18, plaintiff placed himself in the position of being estopped to complain in a Court of Equity.

He admittedly exacted a bonus of \$560. for his \$1000 loan and received a chattel trust on all the L. Harris & Co. assets. He then took the elaborate precaution to secretly record this trust in nearby Maryland, but in this he was frustrated as it was refused recordation there (see back of D. Ex. 1) (R. 91 (23-27)). He then recorded it in the District. In addition to this concealment from him, it is admitted that Harry S. Wender was never informed of any of the other financial transactions which plaintiff was constantly carrying on with Ulanow and Marcus.

From October through January, a period of four months, plaintiff cashed or endorsed for the credit of that company a minimum of 93 checks for which Ulanow testified Plaintiff was paid substantial discounts (R. 98).

It must be remembered that seven of these checks, in sums ranging from \$125 to \$400 (D. Ex. 3), were issued between Jan. 12 and Feb. 2, 1938, at a time when plaintiff claims that L. Harris & Co. was overdrawn on its checking account by several thousands of dollars. Yet plaintiff would have the Court believe that he knew nothing of the business' financial circumstances.

Plaintiff had carefully conserved and introduced in evidence 11 cancelled checks (P. Ex. 7) that had been given to

Harry S. Wender by L. Harris & Co. chiefly in repayment of advances Wender had made to the business. Nevertheless, when asked to produce his own checking account records covering the same period, he complacently admitted he had "destroyed all of his check-book stubs and cancelled checks and could not produce them to show whether or not he had actually exchanged his own checks for any of the 93 L. Harris & Co. checks (D. Ex. 3)" (R. 86-87).

Plaintiff introduced Ulanow to the Seat Pleasant Bank where an L. Harris & Co. checking account was opened on Feb. 11, when plaintiff signed a signature card empowering him to sign checks thereon, *as a partner with Ulanow*, all without Wender's knowledge. By this act he admittedly considered himself already a partner in L. Harris & Co. (R. 86 (1-3)). Ulanow corroborated this by testifying that he met plaintiff on that occasion "to close the transaction" (R. 100 (5)). Therefore, it is clear that a secret Greenblat-Ulanow partnership was already functioning *before* plaintiff (Greenblat) signed the contract with Wender. Plaintiff thus envisioned an opportunity for further and larger gains from L. Harris & Co., and was willing to forsake a business in which he had spent a lifetime in order to embark upon an untried and risky business venture that depended for its success upon the rise and fall of the market! (R. 82 (11-15); 93 (19; 27-29); 98 (11-13); 99 (5-10); 107 (1)).

(B) Laches In Repudiating Contract As Bar.

Plaintiff testified that shortly after going into the business he found conditions were not as represented to him by Marcus. Instead of repudiating the contract and adhering to it, he continued on, complaining to Ulanow, who told him to wait and that if conditions did not improve he would try to have his interest purchased by someone else (R. 84

(25-27); 100 (22-24)). Plaintiff spoke to Harry S. Wender during this interval, but said nothing to him about being deceived (R. 92 (27-30)). Indeed, it was not until the business had closed at the end of April and all the assets dissipated, including huge stocks of merchandise (whether by injudicious management or otherwise) that Wender first learned through an attorney of plaintiff's complaint of misrepresentations (R. 93 (15-19)).

Such failure by plaintiff immediately to seek rescission and adhere to it, rather than continuing in the business in the hope of effecting an adjustment, constitutes further ground for equitable estoppel, and operates as a bar to recovery.

In *Shappirio v. Goldberg*, 20 App. D. C. 185, 194 (192 U. S. 232), this Court enunciated the doctrine that—

“* * * if the party complaining seeks to have a contract rescinded, or changed in a material particular, upon the ground of mistake or fraud, he *MUST*, upon discovery of the facts, at once announce his purpose and adhere to it, otherwise he will be held to have waived the objection and be bound as if no mistake or fraud had occurred.” (Emphasis, Court's own.)

On this point see also 24 Am. Jur. 32, *Fraud and Deceit*, sec. 208—*Delay In Rescission Cases*, citing numerous Federal and state cases.

(C) **Two Innocent Parties Doctrine As Estoppel.**

Even if the case were to resolve itself into one where plaintiff be regarded as an innocent party, and either Harry S. Wender singly or jointly with Wolf B. Wender as another, it is respectfully submitted that, on the whole record, the loss should be borne by plaintiff, since he was the one who was in better position to avoid the loss.

In signing the contract with the Wenders, plaintiff was primarily enabled legally to remove the Wenders so that he could continue freely to effectuate his own purposes. The Wenders did not seek him out; rather he sought them.

Another aspect of this doctrine is that if the Wenders and plaintiff all be considered as innocent parties who must suffer by the acts of a third person—Marcus—then plaintiff, being the one who enabled Marcus to perform those acts which resulted in loss, must sustain it.

Hill v. Lowe, 6 Mackey (17 D. C.) 1428.

Gray v. Jacobsen, 56 App. D. C. 353, 48 A. L. R. 583.

Conclusion.

On the whole case, these appellees respectfully submit that the findings of fact and conclusions of law are wholly supported by the evidence adduced at the trial below.

The equitable maxim, "Fraud Is Odious And Is Not To Be Presumed", is especially applicable here. It is axiomatic that the law should presume that men act and intend to act in their business dealings fairly and honestly and without any intention of defrauding others.

In reversing an Equity decree vacating a sale as fraudulent, (Eureka Dairy Co. v. McSween, 37 App. D. C. 1, 8), this Court used the following significant language:

"To rescind a sale upon the ground that it was induced by false and fraudulent representations, and thus judicially brand the vendor as a fraud, is a serious matter, and a court of *equity will not exercise such extraordinary power unless the evidence is of a very convincing character*. 'Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never

for alleged false representations, unless their falsity is certainly proved * * *". (Italics supplied.)

These appellees therefore maintain that the decree appealed from should be affirmed.

Respectfully submitted,

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